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IN THE
Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY,
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, amendments to the previously filed corporate disclosure statement are included below. The page numbers of the Appendix, on which the corporations requiring amended statements appear, are included for convenience.

Central Illinois Public Service Company (84a) is now referred to as: AmerenCIPS

CINergy Corp. (85a) now lists its subsidiaries in the following manner:

Subsidiaries:

The Cincinnati Gas and Electric Company

Subsidiaries:

KO Transmission Company

Subsidiaries:

Lawrenceberg Gas Company

Miami Power Corporation
Tri-State Improvement Co.
Union Light, Heat and Power Company
The Western Harrison Gas and Electric Company

Cinergy Investment

Subsidiaries:

Cinergy-Cadence, Inc.
Cinergy Resources, Inc.

Cinergy Services
PSI Energy, Inc.

Kansas City Power & Light (89a) no longer lists KLT Power, Inc. as a subsidiary

Ohio Power Company (91a) now lists Cardinal Operating Co. as a subsidiary

PacifiCorp (91a-92a) no longer lists the following corporations as subsidiaries:

Cascade Autovon Co.
Gem State Utilities Corporation
Inter Island Telephone Co., Inc.
International Communications Holdings, Inc.
Northwestern Telephone Systems, Inc.
Pacific Telecom Cellular, Inc.
Telephone Utilities of Alaska, Inc.
Telephone Utilities of Eastern Oregon, Inc.
Telephone Utiliites of Oregon, Inc.
Telephone Utilities of Washington, Inc.

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Judge A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. Rev. 1 (April, 1999) 2

ARGUMENT

The Government asserts that the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") and other federal Courts of Appeals can refuse a clear congressional command to those courts to undertake prompt, pre-enforcement review of final legislative rules on the basis of the prudential ripeness doctrine in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (hereafter "*Abbott Labs*") and its progeny. Without responding directly to many of Petitioners' arguments, the Government contends that certiorari should not be granted in this case. According to the Government, the Circuit Court with jurisdiction to review all final, nationally applicable legislative rules promulgated by EPA has unconstrained discretion to apply the *Abbott Labs* test of prudential ripeness and thereby pick and choose which final rules to review unless Congress states "in express terms" that the *Abbott Labs* test does not apply.

Abbott Labs involved judicial review in a district court under generic "federal question" jurisdiction. "Federal question" jurisdiction applies universally to all cases arising under federal law. Since it embodies no specific judgment regarding which cases shall be reviewed, it allows courts to apply judicially created "prudential" standing and ripeness doctrines to decline review. By contrast, statutes like the Clean Air Act ("CAA" or "Act") that mandate pre-enforcement judicial review of specified agency actions have never been interpreted by this Court to allow lower courts to dismiss a case on "prudential" standing or ripeness grounds. In these statutes, unlike the federal question statute, Congress has specifically directed reviewing courts to exercise jurisdiction.[1]

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[1] Petition for Writ of Certiorari ("Pet.") at 16-20.

The D.C. Circuit clearly has a different view of the law. Judge Randolph, the author of the opinion at issue in this case, explained in a recent speech to the District of Columbia bar:

> Before we leave *Abbott Laboratories* I would like to comment on the current state of affairs regarding pre-enforcement review of agency regulations. There is, I believe, a serious question whether, since 1967, *the pendulum has swung too far in favor of permitting such review*. Increasingly, our court is confronted with regulations of the most abstract nature, often dealing with complex technological subjects. . . . *I am more than a little uncomfortable with the system as it has evolved* since *Abbott Laboratories*, which imposes on courts the burden of deciding the validity of rules in the absence of concrete settings. *I think the time has come for us to be more discriminating* . . . .[2]

The "pendulum" Judge Randolph refers to was "swung" by Congress in numerous statutes enacted in the two decades following *Abbott Labs*. In those statutes, Congress directed Circuit Courts to review legislative rules prior to enforcement. While judges in those courts may be "uncomfortable" with that system, it is for Congress, not the courts, to decide that the pendulum has swung too far and that these statutes should be amended to allow courts to decide which rules will be reviewed prior to enforcement based on a subjective balancing of the *Abbott Labs* factors. For this reason and the reasons below, certiorari should be granted in this case.

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[2] Judge A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. Rev. 1, 9-10 (April, 1999) (revised text of speech to the District of Columbia Bar, June 23, 1998) (emphasis added).

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER *ABBOTT LABS* ALLOWS CIRCUIT COURTS TO DISMISS CASES ON PRUDENTIAL RIPENESS GROUNDS WHERE CONGRESS DIRECTED PROMPT, PRE-ENFORCEMENT REVIEW OF FINAL LEGISLATIVE RULES.

The Government asserts that the decision below "rests on a routine application of the two-part [*Abbott Labs*] test" for prudential ripeness.[3] The Government fails to note, however, that the D.C. Circuit applied *Abbott Labs* to a statutory context different from the one in which it arose. There should be nothing "routine" about application of the *Abbott Labs* test to judicial review of final legislative rules under § 307 of the Act and numerous similar provisions enacted by Congress after *Abbott Labs*. *See generally* Pet. at 14-15.

The Government acknowledges that Congress can require a federal court to resolve legal actions "*without regard to the court's self-imposed 'prudential' limitations on the court's own powers, including limitations arising from the prudential doctrine of ripeness.*" Resp. Brief at 9 (emphasis added). The Government maintains, however, that Congress' power to foreclose application of the prudential ripeness doctrine is not at issue because Congress did not intend to do so under the Act. More specifically, the Government argues that § 307 does not explicitly state that "the court of appeals must decide the petition on the merits without any regard whatsoever to prudential principles governing judicial review." *Id.* at 10. This formulaic argument lacks merit.

Although the Government is correct that § 307 does not expressly declare that "the court of appeals must decide the petition on the merits without any regard whatsoever

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[3] Brief for the Respondent in Opposition ("Resp. Brief") at 8.

to prudential principles governing judicial review," the absence of such language does not mean (or imply) that Congress intended a different result. To the contrary, the same result is confirmed simply by reading § 307 *in its entirety*. No better evidence of this fact exists than the Government's inability to provide *any* interpretation of §§ 307(d)(6)(C), 307(d)(7) and 307(e), or the legislative history of § 307 generally, that supports application of *Abbott Labs* to judicial review of final legislative rules under § 307. *See* Pet. at 4-7, 16-20.

Indeed, neither the D.C. Circuit in its decision, nor the Government in its opposition, address the full array of provisions under § 307 or its detailed legislative history.[4] The only provision of § 307 referenced by the Government in support of its opposition is § 307(b)(2), but this reference is to no avail. Congress included § 307(b)(2) to make clear that actions reviewable under § 307(b)(1) in Circuit Courts are not reviewable in District Courts in enforcement proceedings. The provision has nothing to do with "prudential" ripeness principles and says nothing about the jurisdiction of the Circuit Court to review EPA actions under § 307(b)(1). To read § 307(b)(2) as authorizing Circuit Courts to decline jurisdiction granted under § 307(b)(1) stands § 307(b) on its head.[5]

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[4] The Government asserts that the D.C. Circuit explicitly concluded "that Congress preserved the court's authority to apply ripeness principles" under § 307 of the Act. Resp. Brief at 10. In fact, the D.C. Circuit simply *assumed* that it could refuse to exercise its jurisdiction on prudential ripeness grounds without consideration of § 307 in its entirety, which considerations presumably would have occurred if the court had ordered briefing on the issue of prudential ripeness (which it did not).

[5] It also gives District Courts jurisdiction to review final agency District Court concludes that a Circuit Court might not have reviewed the action on prudential ripeness grounds had a petition been filed.

The Government also makes no attempt to rebut Petitioners' detailed assessment of this Court's decisions in *Abbott Labs* and its progeny as those cases relate to pre-enforcement review of final legislative rules. *See* Pet. at 20-23. The Government concedes only that "Congress's decision to authorize pre-enforcement review [is] an important factor bearing on the question of ripeness." Resp. Brief at 11. The Government's concession is far too grudging. This Court has recognized that Congress' wishes regarding pre-enforcement review are not merely a "factor" to be considered, but binding directives to be followed. *See, e.g., Ohio Forestry Ass'n, Inc. v. Sierra Club*, 118 S. Ct. 1665, 1672 (1998); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980); *Abbott Labs*, 387 U.S. at 146.

Nor is there merit to the Government's assertion that "[i]f Congress had intended the extraordinary result that courts must conduct a pre-enforcement review [without consideration of prudential ripeness] . . . then Congress presumably would have said so in express terms." Resp. Brief at 12. The plain language of § 307 accomplishes precisely this result when read in its entirety. Moreover, this Court rejected the Government's proposed approach for interpreting § 307 in a related setting, noting that "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison v. PPG Indus., Inc.*, 446 U.S. at 592. In the Court's view, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute." *Id. Compare Bennett v. Spear*, 117 S. Ct. 1154, 1162 (1997) (holding that Congress "expressly negated" prudential standing concerns even

though statute makes no explicit reference to prudential standing).

The Government maintains the D.C. Circuit determined that the credible evidence petitions could not be "evaluated in the abstract" and therefore postponed review "until the agency attempts to apply specific credible evidence in a concrete enforcement setting." Resp. Brief at 12. The Government's arguments simply parrot those made by the D.C. Circuit in its decision and are equally unpersuasive.

Petitioners raised a series of purely legal challenges, including several procedural challenges, to the credible evidence rule. Pet. at 9-11. Resolution of those legal challenges *does not depend to any degree on whether "concrete" credible evidence might or might not be different from, or more stringent in effect than, the applicable results from the performance tests prescribed by regulation.* Like the D.C. Circuit, the Government never explains why resolution of these purely legal issues must await the "concrete setting" sought by the D.C. Circuit. Indeed, this Court has noted that persons injured by an agency's failure to adhere to procedural requirements "may complain of that failure *at the time the failure takes place, for the claim can never get riper.*" *Ohio Forestry Ass'n*, 118 S. Ct. at 1672 (emphasis added).

The Government's assertion that the postponement of review does "not harm the affected parties" is similarly misguided. *See* Resp. Brief at 11. Whether Petitioners suffer harm by virtue of delayed judicial review is not a relevant consideration under a statute such as CAA § 307. So long as Petitioners have suffered harm sufficient to satisfy Article III's "case or controversy" requirement —a point not disputed in this case—Congress is, as the Government concedes, free to eliminate application by a

reviewing court of prudential justiciability doctrines. Resp. Brief at 9. This is precisely what § 307 accomplishes.

In any event, Congress recognized that "[a]dministratively developed standards, rules and regulations under the Act . . . *clearly affect the interests of parties.*" App. 68a (emphasis added). Congress commanded that judicial review occur "within controlled time periods" for this very reason. *Id.*

Despite the Government's claims to the contrary, the credible evidence rule has binding legal effect on petitioners who must now consider the possibility that they may be subjected to criminal, as well as civil and administrative penalties, *based on information, such as continuous opacity monitoring data, that prior to the credible evidence rule was completely irrelevant to compliance determinations. See* Pet. at 7-9.[6] Some at least, such as those who may lack complete confidence in the judicial system or those who have a strong aversion to even the possibility of being sent to prison, will be forced to meet more stringent standards to avoid the alternative of having to develop and present "a defense in an enforcement action" on which the D.C. Circuit's decision and the Government's opposition so squarely rests.

The legislative history is clear that Congress intended to strictly time-limit the D.C. Circuit's jurisdiction to review final legislative rules "affect[ing] the interests" of regulated parties "unless a petitioner can show that *the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days.*" App. 68a, 77a-78a (emphasis added). There is no dispute in

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[6] Under § 113(b) of the Act, courts can impose civil penalties of $25,000 per day for each violation. 42 U.S.C. § 7413(b). Under § 113(c), a person may be imprisoned for up to five years for a single violation. *Id.* § 7413(c).

this case that the "basis" for Petitioners' challenge to the credible evidence rule arose within the designated 60 day period. Nothing in the D.C. Circuit's decision or the Government's opposition suggests that the case involves anything other than "merely postpon[ing] judicial review" as a matter of judicial prudence. Resp. Brief at 7. The D.C. Circuit has determined that the "basis" for Petitioners' challenge may only be reviewed at a time and in a forum (i.e., district court) different from that directed by Congress. This the D.C. Circuit simply cannot do. Pet. at 17-18; App. 77a-78a.

In short, the Government fails to provide a sound basis for denying certiorari in this case. Contrary to the Government's bald assertion that the D.C. Circuit's decision "does not conflict with any decision of this Court," [7] the D.C. Circuit's decision fundamentally misconstrues this Court's seminal decisions on the issues of prudential ripeness as it applies to congressionally mandated Circuit Court pre-enforcement review of final legislative rules.

II. CERTIORARI SHOULD BE GRANTED TO AVOID AN UNWIELDY AND ILL-DEFINED PROCESS OF JUDICIAL REVIEW OF FINAL AGENCY ACTIONS.

The Government contends alternatively that, even if Petitioners' claims had merit, this Court should not grant certiorari because there is no split in the Circuit Courts regarding application of *Abbott Labs* to statutes such as CAA § 307. Resp. Brief at 12-13. The Government's reliance upon the absence of a direct circuit split is unpersuasive because the D.C. Circuit has exclusive responsibility to review final legislative rules of nationwide scope arising under the Act and many other similar federal stat-

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[7] Resp. Brief at 7.

utes.[8] As Judge Levanthal recognized long ago, one of the principal objectives of § 307(b) was "*to avoid conflicting holdings by various federal courts of appeals*" regarding the validity of rules of nationwide scope under the Act. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849-50, n.15 (D.C. Cir. 1972) (emphasis added). Thus, far from supporting denial of certiorari, the absence of a circuit split further highlights *why review by this Court is essential.* The D.C. Circuit alone decides judicial policy in this area, subject only to this Court's oversight.

Finally, the Government complains that Petitioners have engaged in "hyperbole" in characterizing the D.C. Circuit's decision as "a dangerous precedent." Resp. Brief at 14. The Government is unable, however, to provide answers to *any* of the many questions raised by the D.C. Circuit's decision regarding further review of the credible evidence rule. *See* Pet. at 23-25. This suggests that the Government is as baffled as Petitioners regarding the implications of the D.C. Circuit's decision for judicial review of final legislative rules.

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[8] The Government mischaracterizes the Second Circuit's decision in *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40 (2d Cir. 1993) by suggesting that the Second Circuit has embraced the *Abbott Labs* test for prudential ripeness. Resp. Brief at 13-14. The Second Circuit ruled that the case was ripe for review *even if* the *Abbott Labs* test applied. In accordance with this Court's decisions, the Second Circuit recognized that *Abbott Labs* has "limited relevance" in cases where Congress has ordered pre-enforcement review. *Ciba-Geigy Corp.*, 3 F.3d at 46.

CONCLUSION

For the foregoing reasons, the Government's arguments in opposition to certiorari are without merit and the petition for a writ of certiorari to the D.C. Circuit should be granted.

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